

Message Text

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ORIGIN ARA-20

INFO OCT-01 ISO-00 L-03 JUSE-00 RSC-01 /025 R

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P 212154Z DEC 73

FM SECSTATE WASHDC

TO AMEMBASSY BRASILIA PRIORITY

INFO AMCONSUL RIO DE JANEIRO PRIORITY

AMCONSUL SAO PAULO PRIORITY

LIMITED OFFICIAL USE STATE 249383

E.O. 11652: N/A

TAGS: AFSP, BR

SUBJECT: SUIT AGAINST GOB FOR DAMAGES CAUSED BY CHANCERY
CONSTRUCTION

REF: STATE 230957

SUMMARY: FOLLOWING IS INTENDED INFORM EMBASSY OF STEPS
DEPT. PLANNING TAKE. SUIT HAS BEEN FILED AGAINST GOB AND
FOREIGN MINISTRY ARCHITECT INTER ALIA FOR DAMAGE ALLEGEDLY
CAUSED NEIGHBORING PROPERTY BY CONSTRUCTION BRAZILIAN
CHANCERY HERE. BRAZILIAN EMBASSY REQUESTED DEPARTMENT
SUGGEST TO COURT THAT GOB HAS SOVEREIGN IMMUNITY AND
ARCHITECT HAS DIPLOMATIC IMMUNITY. DEPARTMENT HAS
DETERMINED THAT IT CANNOT ACCEDE TO THESE REQUESTS AND
WILL PRESENT NOTE TO THIS EFFECT TO AMBASSADOR ARAUJO
CASTRO IN WEEK OR SO. DEPARTMENT DOES NOT BELIEVE
APPLICATION OF RESTRICTIVE THEORY BY GOB WOULD SERIOUSLY
AFFECT US INTEREST IN BRAZIL. USG INSISTENCE THAT LABOR
CASES BE LITIGATED IN COURTS OF GENERAL JURISDICTION
RATHER THAN LABOR COURTS IS BASED ON BRAZILIAN LAW, NOT
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ON CLAIM BY US TO SOVEREIGN IMMUNITY IN SUCH CASES.

1. CONSTRUCTION OF NEW BRAZILIAN CHANCERY IN WASHINGTON
ALLEGEDLY CAUSED APPROXIMATELY 140,000 DOLLS DAMAGE TO
NEIGHBORING PROPERTY OWNED BY FORMER AMBASSADOR AND
MRS. GEORGE RENCHARD WHO HAVE FILED SUIT AGAINST ALL

PARTIES INVOLVED IN CONSTRUCTION INCLUDING GOB AND FOREIGN MINISTRY ARCHITECT. BRAZILIAN EMBASSY OBJECTED TO HAVING BEEN SERVED PROCESS THROUGH MAIL. IT ALSO REQUESTED DEPARTMENT RECOGNIZE AND SUGGEST TO US DISTRICT COURT THAT GOB ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT AND ARCHITECT ENTITLED TO DIPLOMATIC IMMUNITY.

2. COURT RULED MAY 23 THAT SERVICE OF PROCESS BY MAIL WAS EFFECTIVE. ACTING ON INSTRUCTIONS FROM FOREIGN MINISTRY, AMBASSADOR ARAUJO CASTRO MET WITH ASSISTANT SECRETARY KUBISCH TO OBJECT TO COURT'S RULING.

3. IN ACCORDANCE NORMAL PRACTICE SUCH CASES DEPARTMENT THEN INVITED COUNSEL FOR BOTH PARTIES SUBMIT WRITTEN AND ORAL ARGUMENTS ON QUESTION OF WHETHER SOVEREIGN IMMUNITY SHOULD BE SUGGESTED. INFORMAL PROCEEDING HELD OCTOBER 31 AT WHICH THREE SENIOR ATTORNEYS FROM L HEARD ARGUMENTS BY BOTH SIDES.

4. AFTER CAREFUL EXAMINATION OF CASE, DEPARTMENT HAS CONCLUDED IT CANNOT SUGGEST TO COURT THAT GOB HAS SOVEREIGN IMMUNITY FROM THIS SUIT. DEPARTMENT'S POSITION IS BASED ON RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY WHICH HOLDS THAT IMMUNITY OF A SOVEREIGN OBTAINS IN GOVERNMENTAL OR PUBLIC ACTS OF A STATE BUT NOT IN COMMERCIAL OR PRIVATE ACTS. RESTRICTIVE THEORY FOLLOWED BY MANY EUROPEAN AND LATIN AMERICAN COUNTRIES AND WAS ANNOUNCED BY DEPARTMENT IN TATE LETTER OF 1952 AND REPUBLISHED IN DIGEST OF INTERNATIONAL LAW IN 1968. CORE OF DEPARTMENT'S CONCLUSION IS THAT SOVEREIGN IMMUNITY SHOULD NOT BE SUGGESTED IN THIS CASE BECAUSE CONSTRUCTION OF A BUILDING IS NOT A SOVEREIGN ACT EVEN IF ITS PURPOSE, BUILDING A CHANCERY, IS CLEARLY SOVEREIGN. DEPARTMENT HAS ALSO CONCLUDED THAT FOREIGN MINISTRY ARCHITECT WHO WAS IN US ONLY FOR BRIEF PERIODS DOES NOT ENJOY LIMITED OFFICIAL USE
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DIPLOMATIC IMMUNITY IN US.

5. DEPARTMENT WILL PRESENT NOTE CONVEYING ITS CONCLUSIONS AND REASONS FOR THEM TO AMBASSADOR ARAUJO CASTRO IN EARLY JANUARY. NOTE CITES TATE LETTER AND OTHER PRECEDENTS THEN STATES QUOTE AFTER WEIGHING ALL ASPECTS OF THE MATTER, THE DEPARTMENT OF STATE HAS COME TO THE CONCLUSION THAT THE ACTIVITIES IN QUESTION ARE ESSENTIALLY OF A PRIVATE NATURE UNDER THE STANDARDS SET FORTH IN THE TATE LETTER. THE DEPARTMENT OF STATE IS IMPRESSED BY THE FACT THAT THE CONTRACT AND ALLEGED TORT WHICH FORM THE BASIS OF THIS DISPUTE ARE VERY MUCH AKIN TO THOSE THAT MIGHT BE ENTERED INTO BY OR OCCUR TO A PRIVATE PARTY. THE POLICY EXPRESSED IN THE TATE LETTER TURNS UPON THE NATURE OF THE

ACTIVITIES OF THE GOVERNMENT AGENCY INVOLVED AND NOT UPON ITS CHARACTER AS A GOVERNMENT AGENCY OR THE PURPOSE OF THOSE ACTIVITIES. THAT THE CONSTRUCTION OF THE EMBASSY IS INSPIRED BY AN IMPORTANT GOVERNMENTAL PURPOSE, THE DEPARTMENT OF STATE DOES NOT QUESTION. NEVERTHELESS, FOR THE REASONS STATED, THE DEPARTMENT OF STATE IS OBLIGED TO CONCLUDE THAT THE PRESENT CASE IS NOT ONE WHERE A SUGGESTION OF SOVEREIGN IMMUNITY SHOULD BE MADE. UNQUOTE.

6. ON QUESTION OF DIPLOMATIC IMMUNITY OF ARCHITECT NOTE STATES: QUOTE AS REFLECTED IN THE DEPARTMENT'S JUNE 1, 1962 CIRCULAR NOTE TO CHIEFS OF MISSION, WHICH IS QUOTED IN YOUR EXCELLENCY'S NOTE OF DECEMBER 6, 1972, THE DEPARTMENT HAS BEEN OF THE VIEW THAT UNLESS AN INDIVIDUAL IS ON DUTY IN THE UNITED STATES FOR MORE THAN THIRTY DAYS, SUCH PERSONS ARE PROPERLY CONSIDERED GOVERNMENT OFFICIALS ON TEMPORARY DETAIL IN THE UNITED STATES RATHER THAN EMPLOYED IN THE SERVICE OF THE MISSION. IT IS NOT THE PRACTICE OF THE DEPARTMENT OF STATE TO CERTIFY SUCH PERSONS AS BEING ENTITLED TO DIPLOMATIC IMMUNITY. UNQUOTE.

7. ALTHOUGH DEPARTMENT OFFICIALS HAVE INDICATED TO AMBASSADOR ARAUJO CASTRO THAT DEPARTMENT MIGHT NOT BE ABLE ACCEDE TO EMBASSY'S REQUESTS, AMBASSADOR LIKELY REGISTER DISAPPOINTMENT WHEN OFFICIALY ADVISED OF DECISIONS. DEPARTMENT INTENDS POINTOUT THAT DECISIONS HAD TO BE LIMITED OFFICIAL USE
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MADE ON LEGAL GROUNDS WHICH TOOK INTO ACCOUNT BROAD PATTERN OF IMMUNITY CASES WITH WHICH WE MUST DEAL AND THAT OUR POSITION MUST BE CONSISTENT EVEN THOUGH THIS OBLIGES US TO REACH DECISIONS WHERE REGRETTABLY WE ARE UNABLE RESPOND POSITIVELY TO WISHES OF FRIENDS.

8. IT SHOULD BE NOTED THAT THERE IS LIKELIHOOD GOB MAY HAVE TO PAY FEW OR NO DAMAGES IN THIS CASE. CONTRACTS BETWEEN GOB AND CONTRACTORS INCLUDE DISCLAIMERS OF RESPONSIBILITY BY GOB FOR DEFECTS OR NEGLIGENCE DURING CONSTRUCTION. HOWEVER, IN ORDER EFFECTIVELY FILE SUIT PLAINTIFF HAD TO NAME AS DEFENDANT ALL PARTIES INVOLVED IN CONSTRUCTION. COURT WILL DECIDE WHICH IF ANY OF DEFENDANTS MUST PAY FOR DAMAGES. IF IT HAD BEEN DECIDED THAT GOB WAS ENTITLED TO SOVEREIGN IMMUNITY CO-DEFENDANTS PROBABLY WOULD HAVE TRIED TO HIDE BEHIND THIS SHIELD, LEAVING PLAINTIFF WITH NO RECOURSE.

9. GOB MAY RESPOND TO DEPARTMENT'S DECISION BY ADOPTING RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY IN DEALING WITH OUR POSTS IN BRAZIL. OBVIOUSLY IF WE FOLLOW RESTRICTIVE THEORY WE MUST BE PREPARED TO ABIDE BY IT WHEN IT IS

APPLIED TO US.

10. DEPARTMENT DOES NOT BELIEVE APPLICATION OF RESTRICTIVE THEORY BY GOB WOULD ADVERSELY AFFECT OUR INTERESTS IN BRAZIL AT PRESENT. IF GOB SHOULD INQUIRE WITH RESPECT TO USG POSITION ON LABOR CASES, EMBASSY MAY NOTE THAT USG IS WILLING TO LITIGATE LABOR CASES ON THE MERITS IN FEDERAL COURTS OF GENERAL JURISDICTION BUT NOT IN COURTS OF LIMITED JURISDICTION SUCH AS THE BRAZILIAN LABOR COURTS WHERE THE USG IS NOT REQUIRED TO APPEAR BUT MAY VOLUNTARILY APPEAR. USG ACKNOWLEDGES THAT THIS USG POSITION ON LABOR LAW SUITS MAY EFFECTIVELY PRECLUDE BRAZILIAN PLAINTIFFS FROM TRYING THEIR CAUSES OF ACTION BUT USG BELIEVES THAT THIS HIATUS TO BE CAUSED BY LOCAL BRAZILIAN LAW AND NOT BY ANY INCONSISTENCY IN USG POSITION ON SOVEREIGN IMMUNITY. (FYI: DEPARTMENT HAS BEEN INCREASINGLY RELUCTANT TO RAISE EVEN THIS PROCEDURAL DEFENSE OF REFUSING TO VOLUNTEER TO APPEAR IN BRAZILIAN LIMITED OFFICIAL USE LIMITED OFFICIAL USE

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LABOR COURTS BECAUSE PLAINTIFFS ALMOST ALWAYS CONSUME MORE DEPARTMENT RESOURCES BY APPEALING THEIR CASES THAN WOULD BE INCURRED BY TRYING THE MATTER ON THE MERITS AFTER A VOLUNTARY APPEARANCE.) RUSH

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Message Attributes

Automatic Decaptioning: X
Capture Date: 10 MAY 1999
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: n/a
Control Number: n/a
Copy: SINGLE
Draft Date: 21 DEC 1973
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: smithrj
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1973STATE249383
Document Source: ADS
Document Unique ID: 00
Drafter: ARA/BR:AFWATSON:GJB
Enclosure: n/a
Executive Order: N/A
Errors: n/a
Film Number: n/a
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1973/newtext/t19731257/abqcekji.tel
Line Count: 193
Locator: TEXT ON-LINE
Office: ORIGIN ARA
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 4
Previous Channel Indicators:
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: STATE 230957
Review Action: RELEASED, APPROVED
Review Authority: smithrj
Review Comment: n/a
Review Content Flags:
Review Date: 17 JAN 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <17-Jan-2002 by thigpegh>; APPROVED <17-Jan-2002 by smithrj>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: SUIT AGAINST GOB FOR DAMAGES CAUSED BY CHANCERY CONSTRUCTION
TAGS: AFSP, BR
To: BRASILIA INFO RIO DE JANEIRO
SAO PAULO
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005